No. 95-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL O. LEAVITT, as the Governor of the State of Utah; and JAN GRAHAM, as Attorney General of the State of Utah,

Petitioners,

—v.—

JANE L., JANE F., and JULIE S., on behalf of themselves and all others similarly situated; et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

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Respondents respectfully submit the following supplemental brief in opposition to the petition for certiorari to call the Court's attention to new legislation enacted by the Utah Legislature after respondents' brief in opposition to the petition was filed, and describe why that legislation is an additional reason to deny the writ. On February 28, 1996, the Utah Legislature enacted House Bill 206 (hereinafter "HB 206"), and it was signed into law by Governor Leavitt on March 18, 1996. Its effective date is April 29, 1996.[1]

ADDITIONAL REASONS FOR DENYING THE WRIT

I. HB 206 CONFIRMS THAT UTAH CODE ANN. § 302(3) WAS NOT INTENDED TO STAND ALONE AS A SEPARATE BAN ON POST-VIABILITY ABORTIONS.

HB 206 purports to restrict,[2] on pain of criminal penalties,[3] the use of two abortion procedures after viability. HB 206 defines viability as follows:

> For purposes of this section determination of viability shall be made by the physician, based

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[1]The text of HB 206 is reproduced in the appendix to this Brief; references to this Appendix are in the form "__b"; references to respondents' first brief in opposition are in the form "Opp. Cert. __."

[2]*See* Point II, *infra*.

[3]"Intentional, knowing, and willful" violation of the restriction is a third degree felony. 2b (HB 206, Section 1, at § 76-7-310.5(3)). In a presumably duplicative penalty section, "willful violation of Section . . . 76-7-310.5" is also a felony of the third degree. 2b (HB 206, Section 2, at § 76-7-314(2)). Yet a third penalty provision may also apply to violations of the restriction: "Any person who intentionally performs an abortion other than as authorized by this part is guilty of a felony of the third degree." 2b (HB 206, Section 2, at § 76-7-314(1)(a)).

> upon his own best clinical judgment. The physician shall determine whether, based on the particular facts of a woman's pregnancy that are known to him, and in light of medical technology and information reasonably available to him, there is a realistic possibility of maintaining and nourishing a life outside of the womb, with or without temporary, artificial life-sustaining support.

2b (HB 206, Section 1, at § 76-7-310.5(2)(b)).

This definition of viability undercuts the State's claim that Utah Code Ann. § 76-7-302(3), which virtually prohibits abortion after twenty weeks gestation, was intended by the Utah Legislature to define viability and regulate abortions thereafter.

First, unlike HB 206, section 302(3), if rewritten to impose restrictions only after twenty weeks gestation, affords the physician no discretion in determining viability if the gestational period exceeds twenty weeks. HB 206 demonstrates yet again that when the Utah Legislature wants to define viability, it allows the physician's judgment to guide the determination of viability, as is required by this Court.[4] *See Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976) ("it is not the proper function of the legislature or the courts to place viability . . . at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician."); *Colautti v. Franklin*, 439 U.S. 379, 397 (1979) ("[s]tate regulation that impinges upon this determination . . . must allow the

[4]*See* Opp. Cert. 3 n.6.

attending physician 'the room he needs to make his best medical judgment.'" (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973))).

Second, section 302(2) does not use the terms the Utah Legislature has traditionally used to denote viability -- indeed, the term "viability" does not appear in section 302 at all. HB 206 is further proof that when the Utah Legislature means viability, it uses that term and defines it carefully.

Finally, knowing that the State is urging this Court to reverse the severability decision of the court of appeals and hold that section 302(3) may stand alone as a post-viability restriction,[5] the Utah Legislature has in HB 206 enacted a definition of viability that is inconsistent and irreconcilable with section 302(3)'s "bright-line" definition of viability. Thus, this Court should decline review because, in addition to the grounds stated in respondents' first brief, even if the State's construction of section 302 were ultimately to prevail, the Utah Abortion Control Act as a whole would be self-contradictory and therefore void for vagueness. *See Colautti*, 439 U.S. at 390-94 (statute requiring adherence to specified standard of care if there is determination by physician of whether fetus "is viable" or "if there is sufficient reason to believe that the fetus may be viable" is void for vagueness because "it conditions potential criminal liability on confusing and ambiguous criteria").

[5]The Utah Legislature's awareness of this litigation is indicated in section 4 of HB 206, which states the intent of the legislature that newly-enacted section 310.5 should "not affect or relate in any way to other statutory provisions or litigation regarding those provisions." 3b. The Utah Legislature's statement of intent notwithstanding, a plain reading of section 310.5(2)(b) and the proposed revision of section 302 immediately reveals that the two cannot both be the law.

II. HB 206 IS IRRECONCILABLE WITH UTAH CODE ANN. §§ 76-7-307 & 76-7-308, AND THEREFORE MAY RENDER THE STATE'S PETITION AS TO THOSE PROVISIONS MOOT.

HB 206 purports to restrict the use of two methods of abortion: (1) "partial birth abortion" or "dilation and extraction procedure"; and (2) "saline abortion procedure." 2b (HB 206, Section 1, at § 76-7-310.5(2)(a)). These two methods are defined in HB 206. *See* 1b-2b (HB 206, Section 1, at § 76-7-310.5(1)(a)-(b)). Under Section 1 of HB 206, neither method may be used after viability "unless all other available abortion procedures would *pose a risk to the life or the health of the pregnant woman.*" 2b (HB 206, Section 1, at § 76-7-310.5(2)(a)) (emphasis added). HB 206 is inconsistent with and therefore implicitly repeals the choice-of-method provisions invalidated by the court of appeals (sections 307 and 308) for two reasons.

First, HB 206 restricts only two methods of abortion, while sections 307 and 308 restrict *all* methods after viability. Thus, HB 206 indicates the Legislature's intention to lift the restrictions on other methods, under the rule that "the specific governs the general." *Southern Utah Wilderness Alliance v. Board of State Lands & Forestry*, 830 P.2d 233, 235 (Utah 1992).

Second, because HB 206 permits the use of two abortion methods whenever an alternative would pose a risk to the woman's life or health, while the old choice-of-method provisions only permit the use of these methods if an alternative would impose "grave damage" to the woman's health, HB 206 cannot be harmonized with the choice-of-method provisions invalidated by the court of appeals. Utah Code Ann. §§ 76-7-307, -308. The Utah Supreme Court has stated that "an implied repeal can be

found only when the earlier and the later statutes cannot, by any reasonable interpretation, be reconciled so as to be enforceable as a harmonious whole." *Salt Lake City v. Towne House Athletic Club*, 424 P.2d 442, 444 (Utah 1967) (footnote omitted). Under this standard, HB 206 implicitly repeals the choice-of-method statutes held unconstitutional by the court of appeals.[6] Thus, the State's petition for review of the Tenth Circuit's invalidation of them is moot.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: March 27, 1996. Respectfully submitted,

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[6]Of course, if HB 206 does not implicitly repeal sections 307 and 308, physicians deciding what abortion method to use after viability would be faced with conflicting statutes. The conflicting statutes would then likely be void for vagueness. *See* p. 2-3 *supra*.

APPENDIX

LATE TERM ABORTION PROCEDURES

1996 GENERAL SESSION

STATE OF UTAH

* * *

AN ACT RELATING TO ABORTION; PROHIBITING SPECIFIED LATE TERM ABORTION PROCEDURES; PROVIDING A CRIMINAL PENALTY; AND PROVIDING LEGISLATIVE INTENT.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

76-7-314, as last amended by Chapter 2, Laws of Utah 1991, First Special Session

76-7-315, as last amended by Chapter 1, Laws of Utah 1991

ENACTS:

76-7-310.5, Utah Code Annotated 1953

This act enacts uncodified material.

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-7-310.5** is enacted to read:

76-7-310.5. Prohibition of specified abortion procedures.

(1) As used in this section:

(a) "Partial birth abortion" or "dilation and extraction procedure" means the termination of pregnancy by partially vaginally delivering a living intact fetus, purposefully inserting an instrument into the skull of the intact fetus, and utilizing a section device to remove the skull contents. This definition does not include the dilation and evacuation procedure involving dismemberment prior to

removal, the suction curettage procedure, or the suction aspiration procedure for abortion.

(b) "Saline abortion procedure" means performance of amniocentesis and injection of saline into the amniotic sac within the uterine cavity.

(2)(a) After viability has been determined in accordance with Subsection (b), no person may knowingly perform a partial birth abortion or dilation and extraction procedure or a saline abortion procedure, unless all other available abortion procedures would pose a risk to the life or the health of the pregnant woman.

(b) For purposes of this section determination of viability shall be made by the physician, based upon his own best clinical judgment. The physician shall determine whether, based on the particular facts of a woman's pregnancy that are known to him, and in light of medical technology and information reasonably available to him, there is a realistic possibility of maintaining and nourishing a life outside of the womb, with or without temporary, artificial life-sustaining support.

(3) Intentional, knowing, and willful violation of this section is a third degree felony.

Section 2. Section **76-7-314** is amended to read:

76-7-314. Violations of abortion laws -- Classifications.

(1)(a) Any person who intentionally performs an abortion other than as authorized by this part is guilty of a felony of the third degree.

(b) Notwithstanding any other provision of law, a woman who seeks to have or obtains an abortion for herself is not criminally liable.

(2) A willful violation of Section 76-7-307, 76-7-308, 76-7-310, 76-7-310.5, 76-7-311, or 76-7-312 is a felony of the third degree.

(3) A violation of any other provision of this part is a class A misdemeanor.

Section 3. Section **76-7-315** is amended to read:

76-7-315. Exceptions to certain requirements in serious medical emergencies.

When due to a serious medical emergency, time does not permit compliance with Section 76-7-302, Subsection 76-7-304(2) [~~or~~], Subsection 76-7-305(2), or Section 76-7-310.5 the provisions of those sections do not apply.

Section 4. **Legislative intent.**

It is the intent and purpose of the Legislature that the method of determining viability described in Section 76-7-310.5 apply only to that section, for the purposes described in that section, and not affect or relate in any way to other statutory provisions or litigation regarding those provisions.